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May 12, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

DOCKET FILE COPY ORIGINAL

Mr. William Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

Re: Telefónica Larga Distancia de Puerto Rico, Inc.'s Comments
IB Docket No. 95-22; RM-8355; RM-8392

Dear Mr. Caton:

Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD"), by its attorneys, hereby submits for filing an original and five copies of their Reply Comments in connection with the above-captioned matter.

Also enclosed is an additional copy of TLD's Reply Comments which we ask you to date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Alfred M. Mamlet

Alfred M. Mamlet
Counsel for Telefónica Larga Distancia
de Puerto Rico, Inc.

/srh-m
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities	)	IB Docket No. 95-22 RM-8355 RM-8392

REPLY COMMENTS OF TLD

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May 12, 1995

Its Attorneys

Before the
FEDERAL COMMUNICATIONS COMMISSION
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May 12, 1995

SUMMARY

Chairman Hundt recently said that: "Our key goal, I think, should be to foster competition so that the price of communications, as opposed to things communicated, is driven by that competition as close to zero as economically possible."[1] To accomplish this goal, "[f]irst, we need to eliminate all barriers to entering anyone's business."[2]

Until now, the Commission has applied this fundamental principle to the entry of foreign-affiliated carriers. In its decision authorizing Telefónica Internacional ("TI") to enter the U.S. market and provide international facilities-based services by acquiring 79% of Telefónica Larga Distancia ("TLD"), the FCC emphasized that it "has consistently sought to provide for **open entry** in the United States for carriers originating or terminating U.S. international voice or record carrier services as a means of encouraging competition in these services. . . ."[3] There would be significant costs to U.S. consumers if the Commission abandoned its open entry policy by adopting the proposed rule.

The attached study by Professor Paul MacAvoy analyzes the competitiveness of the markets for originating international telecommunications services in the United States. Professor MacAvoy's primary findings are:

- Concentration indices declined in outbound United States international markets in the 1990s, but still remain at high levels. The declines predictably should have led to lower price-cost margins in outbound United States markets for standard IMTS, discount IMTS, and IWATS services if firms set prices in a competitive manner.

---

[1] Reed Hundt, *New Paradigm For The Digital Age,* Apr. 4, 1995 at 8 (Werthein-Schroeder Variety Conference).

[2] Id. at 9.

[3] Telefónica Larga Distancia de Puerto Rico Inc., 8 FCC Rcd 106, 108 (1992) ("TLD Acquisition Order") (emphasis added and footnote omitted).

- Evidence of the effect of market concentration on price-cost margins over time in a sample of important outbound United States markets shows that essentially all margins increased in the 1990s despite declines in market concentration. This evidence supports a finding of tacit collusion in outbound markets for standard IMTS, discount IMTS, and IWATS services.

- Evidence of market concentration and price-cost margins across country-pair markets at a single point in time also supports a finding of tacit collusion. Price-cost margins are not lower in country-pairs with lower market concentration, which supports a finding of tacit collusion.

- Price-cost margins for IMTS and IWATS in essentially all outbound United States markets exceeded 0.70, which is a higher level than found in other highly concentrated industries in the United States.

- Given the current lack of competition in these United States outbound telecommunications markets, facilities-based entry by foreign-affiliated carriers has the potential to make these markets more competitive.[4/]

Professor MacAvoy concludes his analysis with an explanation of the implications of his study for this rulemaking:

> 66. The benefits to United States consumers from encouraging facilities-based entry by foreign carriers depends on the competitiveness of United States international telecommunications markets. By examining trends in United States carriers' price-cost margins and market concentration, I conclude that carriers set prices as if in tacit collusion. The evidence allows no other conclusion because other hypotheses of firm price-setting behavior would result in entirely different dynamic and static patterns of price-cost margins. Since the markets are not competitive, facilities-based entry by foreign carriers should be encouraged in an attempt to increase the competitiveness of United States international telecommunications markets.

[4/] Statement of Professor Paul MacAvoy (May 11, 1995) ("MacAvoy Statement") ¶ 12 (Exhibit A).

> 67. As explained in section I, entry by new firms into markets in which price exceeds the competitive level generally has the effect of lowering price as firms compete for customers. This is particularly true if incumbent firms set prices in a tacitly collusive manner. Consumers would benefit as prices are driven down from monopoly levels set by tacitly colluding firms. This would increase consumer surplus, as the difference between what individuals were willing to pay for a service and what they actually pay would increase. Finally, deadweight welfare losses resulting from monopolistic prices that prevented some customers from purchasing services would decrease as a consequence of competitive entry by new firms.
>
> 68. The Commission should consider the deleterious effects the proposed rule would have on United States consumers. International telecommunications markets are not competitive. United States consumers pay rates significantly above the competitive level as a result of tacitly collusive behavior on the part of incumbent, facilities-based carriers. An alternative policy that would allow facilities-based entry by foreign-affiliated carriers regardless of the presence of reciprocal entry conditions in foreign carriers' markets has the potential to increase price competition which would benefit United States consumers.[5/]

There is no need for the Commission to abandon its open entry policies. The Commission has carefully balanced its open entry policy with strict competitive safeguards on entry into the U.S. market by foreign-affiliated carriers. These safeguards have worked quite well. No commenter (including AT&T) has offered any evidence -- not even an anecdote -- which demonstrates that the Commission's current open entry policies have led to any anticompetitive conduct by foreign-affiliated carriers. Even the hypothetical concerns offered by AT&T are addressed by the Commission's existing safeguards.

5/ Id. ¶¶ 66-68.

A more fundamental problem with the proposed rule is that the Commission lacks the jurisdiction to adopt it. The Executive Branch's Comments underline the difficulties of intruding on the exclusive foreign policy sphere of the Executive Branch. The Executive Branch's proposed solution -- a "consultative process," in which the Commission would have to accord complete deference to the Executive Branch -- fails for two reasons. **First**, Congress has established a statutory scheme that puts the Executive Branch in charge of telecommunications trade matters, and neither the Executive Branch nor the Commission can supplant this statutory scheme. **Second**, complete Commission deference to the Executive Branch would improperly surrender the FCC's independence on Section 214 matters, and would result in decisions made that ignore or discount other arguments and evidence in the record.

No other party has provided an adequate jurisdictional basis for adopting and applying the proposed rule. The authority offered by commenting parties only permits the Commission to safeguard the U.S. market -- not to press for structural reform in foreign countries. Moreover, no party has yet suggested how Commission jurisdiction could be squared with the Constitution, or with Congress' statutory scheme for telecommunications trade policy.

In addition, the proposed rule would be bad trade policy. It is very unlikely to induce foreign carriers and foreign governments to open their markets any sooner than they otherwise would. However, other countries could easily limit U.S. investments abroad by adopting the same reciprocity rule. Instead of adopting the proposed unilateral approach which is likely to offend other countries, the United States should continue seeking a multilateral solution to closed markets through the GATS negotiations on basic services.

If the Commission adopts any new rule, then it should do so in an even-handed fashion. No commenter has offered any basis for excluding the investments of U.S. firms in foreign carriers from coverage of the rule. These U.S. investments in foreign firms pose the same threat of anticompetitive conduct as foreign carrier investments in U.S. firms, and offer the same prospect for leverage to liberalize the telecommunications trade policies in foreign countries. Adoption of AT&T's request for a double standard would be viewed by foreign countries as hypocritical.

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REPLY COMMENTS OF TLD

I. INTRODUCTION

The principal effect of the proposed rule on the public interest would be to harm competition in the U.S. markets for outbound international telephone service. The attached Statement of Paul MacAvoy (Exhibit A) demonstrates that pricing in these markets is not competitive. Indeed, AT&T, MCI and Sprint set their prices as if they were in tacit collusion not to compete. U.S. consumers would gain by the open entry of foreign-affiliated carriers who could bring competition to these markets (Part II).

No commenter was able to provide any evidence that the Commission's existing open entry policies have led to any competitive abuses. The Commission's current safeguards completely protect U.S. carriers competing in markets for U.S. international service (Part III).

More fundamentally, the Commission lacks jurisdiction to enact the proposed rule. The Executive Branch's comments reinforce this point by stressing that its views are entitled to "great deference" amounting to a rubber stamp. Even this proposal would not work because it is inconsistent with the statutory framework Congress established for telecommunications trade issues. All of the jurisdictional authority offered by proponents of the rule suggests only that the Commission can adopt appropriate safeguards to deter anticompetitive conduct, not that the Commission can base entry decisions on the market and regulatory structure of foreign countries (Part IV).

As trade policy, the proposed rule is more likely to harm the ability of U.S. firms to invest abroad, than to promote it. Already, a number of foreign governments and others have pointed out that adoption of the proposed rule could undermine U.S. efforts to negotiate a multilateral GATS agreement. In addition, as the comments in this proceeding underline, the proposed rule would encourage other countries to close their markets to U.S. firms by adopting the same rule proposed here (Part V). These risks might be worth taking if the proposed rule were likely to induce foreign countries to liberalize their telecommunications markets any faster than they are already proceeding. But this is not likely (Part VI).

If the Commission decides to proceed with the proposed rule in the face of all these obstacles, it should at least be even-handed. No commenter provided even a rational basis for exempting coverage of AT&T's investments in foreign carriers. The stated goals of this proceeding would be furthered at least as much by covering AT&T as they would be by covering Telefónica Internacional ("TI"). Foreign governments will view this exemption for U.S. investments in foreign firms as a double standard, further undermining U.S. efforts to open foreign markets (Part VII).

Any new rule should not cover entry of foreign-affiliated carriers whose entry has already been approved by the Commission. Since some foreign carriers have already made substantial investments in reliance on the prior rule, the Commission should not apply any new rule to them (Part VIII).

Finally, the Commission should reject the efforts of AT&T and MCI to expand coverage of the new rule to resale of international services. Carriers providing resale services are not in a position to get any competitive advantage over U.S. carriers (Part IX).

II. THE PROPOSED RULE WOULD HARM COMPETITION IN THE U.S. MARKETS FOR INTERNATIONAL TELECOMMUNICATIONS SERVICES

The Commission's fundamental objective under the Communications Act is to promote the "public interest." In this, and nearly every other, proceeding over the past 20 years involving long distance telecommunications services, the Commission has determined that the public interest requires the maximization of competition in U.S. markets. Fully competitive markets benefit U.S. consumers as prices are lowered to the level of marginal costs and as consumers have greater choices of service offerings.

Indeed, the Commission currently has an open entry policy for foreign-affiliated carriers. In the TLD Acquisition Order,[1/] the Commission stressed that it "has consistently sought to provide for open entry in the United States for carriers originating or terminating U.S. international voice or record carrier services as a means of encouraging competition in these services. . . ."[2/] Similarly, in AmericaTel, the Commission re-emphasized that:

> We have consistently sought to promote open entry in the United States for carriers originating or terminating U.S. international voice or record carrier services. This policy encourages competition in these services in order to foster lower prices and increased service choices for U.S. consumers.[3/]

1/ Telefónica Larga Distancia de Puerto Rico, Inc., 8 FCC Rcd 106 (1992) ("TLD Acquisition Order").

2/ Id. at 108.

3/ In re AmericaTel Corp., 9 FCC Rcd 3993, 3996 (1994).

If the Commission were to abandon its open entry policies by adopting the proposed rule, it would harm U.S. competition in two ways. **First**, the rule would harm competition by limiting foreign-carrier provision of international, facilities-based services. **Second**, the rule would severely restrict the ability of U.S. firms to acquire badly needed foreign capital to compete effectively against AT&T, still the dominant carrier in virtually all domestic and international markets.

Of course, the major proponents of the proposed rule -- AT&T and MCI -- hope to use it to close the door on further competition from foreign-affiliated carriers. They want to protect their large price-cost margins, and to prevent competing U.S. carriers from benefiting from foreign capital since they now have all the capital they need.

A. Limiting Entry Of Foreign Carriers Would Seriously Harm Competition In The United States

The proposed rule would seriously damage competition in the U.S. markets for international telecommunications by limiting entry of foreign carriers. If these markets were highly competitive, then preventing entry of foreign carriers might not lead to significant consumer welfare losses. However, these markets are not truly competitive. Therefore, limiting foreign carrier entry in these markets would significantly harm U.S. consumers, by depriving them of the benefits of lower prices and greater consumer choice that would flow from competitive markets for international telecommunications.

TLD has asked Yale School of Management Professor Paul W. MacAvoy[4/] to prepare an analysis of the competitive effects of adoption of the proposed rule, which

4/ Professor MacAvoy served on President Ford's Council of Economic Advisers and was co-chariman of President Ford's Task Force on Regulatory Reform. He also received appointments from Presidents Carter and Reagan. Recently, Professor MacAvoy served as Dean of the Yale School of Management. He has written (continued ...)

is attached as Exhibit A. Professor MacAvoy divided his analysis into four steps. **First**, he defined the relevant geographical and product markets. Professor MacAvoy's study examined eight of the largest markets for U.S. outbound international service to: Canada, Mexico, United Kingdom, Germany, France, Italy, Japan and the Dominican Republic. These routes accounted for approximately 55% of all outbound U.S. international traffic in 1993.[5/] Professor MacAvoy analyzed three distinct product markets: standard international message toll service ("IMTS"), discount IMTS, and international wide-area telecommunications services ("International WATS").

Second, Professor MacAvoy determined the level of concentration in these markets. Professor MacAvoy primarily focused his analysis on the market shares of AT&T, MCI and Sprint for facilities-based services since those companies collectively hold market shares of at least 94% on all of these eight international routes. However, Professor MacAvoy considered the market shares of all facilities-based participants when computing concentration indexes with the Herfindahl-Hirschman Index ("HHI"). The HHI is used by the Department of Justice and the Federal Trade Commission in the Horizontal Merger Guidelines.[6/] A market with a single firm monopolist would have an HHI of 1.0, while a market with a large number of firms with relatively equal market shares would have an HHI near zero. According to the Department of Justice and Federal Trade Commission, a market with an HHI above 0.18 is "highly concentrated"; a market with an HHI between .10 and .18 is "moderately concentrated"; and a market

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4/ (... continued)

numerous scholarly articles on telecommunications competition. In addition, Professor MacAvoy has served as an expert in several judicial and agency proceedings, including the AT&T antitrust proceedings leading to the divestiture, where he consulted for AT&T from 1978 to 1982. His qualifications are set forth more fully in his Statement ¶¶ 1-6, and in his curriculum vitae (MacAvoy Statement, App. 1.)

5/ MacAvoy Statement ¶ 14.

6/ Horizontal Merger Guidelines (1992).

with an HHI less than .10 is "unconcentrated."[7/] Horizontal mergers in industries with a post-merger HHI above 0.18, and that increase the HHI by at least .01, are "presumed . . . likely to create or enhance market power or facilitate its exercise."[8/]

Professor MacAvoy computed separate HHIs for each of the eight international routes on an annual basis as shown in Table 1.[9/]

TABLE 1

HERFINDAHL-HIRSCHMAN INDICES FOR SELECTED COUNTRIES

U.S. to:	1985	1986	1987	1988	1989	1990	1991	1992	1993
Canada	N/A	N/A	N/A	N/A	N/A	N/A	0.51	0.44	0.42
Mexico	N/A	N/A	N/A	N/A	N/A	N/A	0.64	0.59	0.55
UK	0.91	0.78	0.73	0.68	0.61	0.57	0.54	0.52	0.50
Germany	1.00	1.00	1.00	0.86	0.73	0.68	0.67	0.62	0.56
Japan	1.00	0.96	0.80	0.71	0.64	0.57	0.56	0.52	0.43
France	1.00	0.89	0.69	0.66	0.61	0.56	0.54	0.52	0.49
Dominican Republic	1.00	0.95	0.93	0.97	0.82	0.73	0.70	0.67	0.52
Italy	1.00	0.97	0.83	0.76	0.71	0.65	0.64	0.60	0.56

Table 1 shows that, beginning in 1985, shortly after the AT&T divestiture, the HHIs in the markets for service to these eight countries were at or near 1.0, reflecting AT&T's

7/ Id. § 1.5. The HHI has two scales. The Department of Justice and Federal Trade Commission normally use a scale which ranges from 0 to 10,000. Professor MacAvoy's study uses a scale which ranges from 0 to 1.0, in order to compare HHI data to price-cost margin data.

8/ Id. § 1.51.

9/ These computations were based on data reported to the FCC pursuant to 47 C.F.R. § 43.61 (1994). Since the Commission does not require carriers to report data separately for IMTS and International WATS services, a single HHI is calculated for each country. The FCC did not report market share data for Canada and Mexico prior to 1991.

monopoly position.[10] Since 1985, MCI and Sprint have gained market share from AT&T. Still, by 1993, the HHIs ranged from 0.42 for Canada to 0.56 for Germany.[11] Thus, the HHI in the least concentrated market (0.42 in Canada) is more than twice the 0.18 concentration in a "highly concentrated" market, according to the Horizontal Merger Guidelines.

Third, Professor MacAvoy calculated the prices charged and the marginal costs on these routes.[12] The marginal cost calculations included costs for originating local access in the United States, domestic network costs, international network costs and net international settlement costs.[13] Based on these prices and costs, Professor MacAvoy calculated price-cost margins.

Price-cost margins in most of the standard IMTS and International WATS markets exceeded 70% by 1994.[14] That is, for every dollar of revenue, U.S. consumers paid carriers more than $.70 above their marginal costs in most markets.

Fourth, Professor MacAvoy analyzed the price-cost margin and market concentration data to determine if the markets were competitive. He applied two tests. First he looked at the dynamic data by comparing changes in firms' price-cost margins over time to changes in the market concentration. Then Professor MacAvoy looked at

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10/ MacAvoy Statement ¶ 17.

11/ Id. ¶ 16.

12/ The price data are taken from tariffs filed at the FCC. The marginal cost data came from FCC reports and from Wharton Economic Forecasting Associates, as detailed in Appendix 4 of the MacAvoy Statement. Professor MacAvoy's analysis of prices includes consideration of calls made at different times of the day and the discount plans offered by the major carriers. Id. ¶¶ 41-48.

13/ Id. ¶¶ 50-56.

14/ Id. ¶ 57. There were exceptions for the Dominican Republic, Mexico and Italy (for AT&T and Sprint).

static data by comparing market concentration and price-cost margins across markets at a single point in time.

Looking at the dynamic data, the hypothesis is that, if these international markets were competitive, then margins would fall as market concentration decreases because firms would compete for market share by reducing their margins.[15/] Indeed, if the markets were fully competitive, then the price-cost margins would be zero since price would equal marginal cost.[16/]

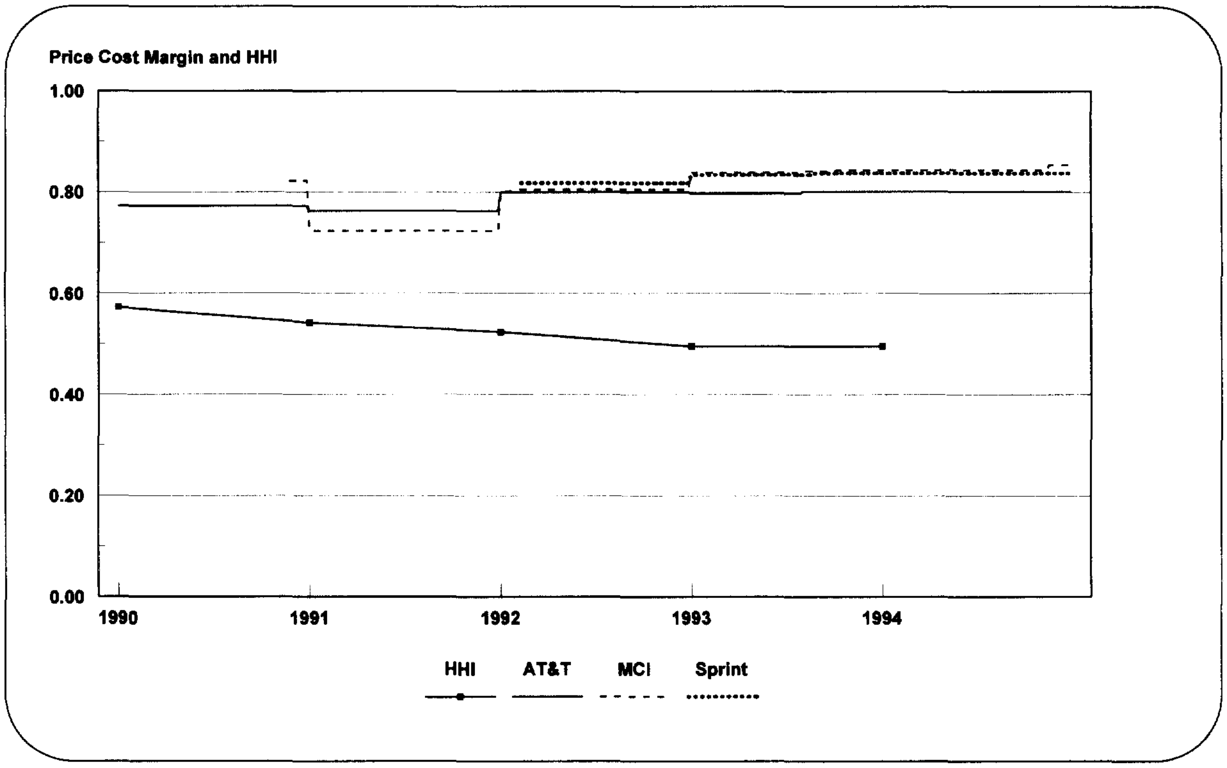
However, the price-cost margins have generally increased while market concentrations decreased. For example, on the United Kingdom route, as illustrated in Figure 1, the price-cost margin has generally increased for AT&T, MCI and Sprint while the level of concentration (HHI) has decreased.[17/]

15/ Id. ¶¶ 23, 60.

16/ Id. ¶ 9.

17/ Similar graphs for the other markets are included in the MacAvoy Statement ¶ 57.

FIGURE ONE
IMTS PRICE-COST MARGINS FOR LONG-DISTANCE CALLS FROM U.S. TO UNITED KINGDOM



The same is true in the other markets. As market concentration declined, price-cost margins increased or remained stable. According to Professor MacAvoy:

> The evidence firmly rejects this hypothesis [of a competitive market], as essentially all margins in individual country-pair markets increased despite declines in HHI.[18/]
>
> It is clear from this dynamic behavior that:
>
> 61. The only hypothesis regarding the "toughness" of firm price-setting relationships supported by the dynamic behavior of increasing or stable price-cost margins and decreasing HHIs is that of tacit collusion. Recall that according to the theory of tacit collusion, changes in HHI have no direct association with changes in price-cost margins. A decline in HHI could be coincident with an

18/ Id. ¶ 60.

increase in the extent to which firms set prices in a collusive manner, resulting in increasing margins despite decreasing market concentration. The evidence on market dynamics rejects the Cournot and Bertrand hypotheses [of competitive markets], but supports the predictions of the tacit collusion hypothesis. **Accordingly, the evidence is that the three leading carriers set their prices as if in tacit collusion in these markets for outbound international telecommunications services.**[19/]

Professor MacAvoy then turned to an analysis of the static market data. If these markets were competitive, then markets with lower HHIs would have lower price-cost margins. As shown in Table 2, this not the case.

TABLE 2				
HHIs AND STANDARD IMTS PRICE-COST MARGINS (1994)				
		Price Cost Margins		
Country	HHI	AT&T	MCI	Sprint
Canada	0.42	0.80	0.74	0.71
Mexico	0.55	0.45	0.58	0.60
United Kingdom	0.50	0.80	0.84	0.84
Germany	0.56	0.70	0.72	0.75
Japan	0.43	0.87	0.82	0.84
France	0.49	0.90	0.76	0.74
Dominican Republic	0.52	0.50	0.40	0.41
Italy	0.56	0.58	0.58	0.81

For example, the HHI in Mexico exceeds the HHI in Canada, but the price-cost margin in Mexico is lower than the price-cost margin in Canada.[20/] Based on the static market data, Professor MacAvoy concludes that: "[t]he only hypothesis regarding the firm

19/ Id. ¶ 61 (emphasis added).

20/ Id. ¶ 62.

price-setting relationships supported by the static market evidence of price-cost margins and HHIs is that of tacit collusion."[21/]

Furthermore, these price-cost margins are quite large when compared to margins in other industries.

> 64. The IMTS and IWATS margins in the eight country-pair markets also generally exceed those found in United States domestic markets for long-distance MTS and WATS services. Domestic MTS margins for AT&T, MCI, and Sprint were approximately 0.7 in 1994, but most of the IMTS margins exceeded 0.7 by 1994. The IMTS and IWATS margins also exceed levels found in highly concentrated manufacturing industries in the United States. In a sample of 284 U.S. industries examined for 1981, the average price-cost margin was 0.275, or less than half the value found for most of the standard IMTS markets. In addition, for the group of industries in this sample of 284 having the highest market concentration (the top four firms accounting for at least 81 percent of sales), the average price-cost margin was 0.33 or still less than half the value for most of the international markets. [22/]

The implications of Professor MacAvoy's study for this rulemaking are clear:

> 66. The benefits to United States consumers from encouraging facilities-based entry by foreign carriers depends on the competitiveness of United States international telecommunications markets. By examining trends in United States carriers' price-cost margins and market concentration, I conclude that carriers set prices as if in tacit collusion. The evidence allows no other conclusion because other hypotheses of firm price-setting behavior would result in entirely different dynamic and static patterns of price-cost margins. Since the markets are not competitive, facilities-based entry by foreign carriers should be encouraged in an attempt to increase the

---

21/ Id. ¶ 63.

22/ Id. ¶ 64 (footnotes omitted).

competitiveness of United States international telecommunications markets.

67. As explained in section I, entry by new firms into markets in which price exceeds the competitive level generally has the effect of lowering price as firms compete for customers. This is particularly true if incumbent firms set prices in a tacitly collusive manner. Consumers would benefit as prices are driven down from monopoly levels set by tacitly colluding firms. This would increase consumer surplus, as the difference between what individuals were willing to pay for a service and what they actually pay would increase. Finally, deadweight welfare losses resulting from monopolistic prices that prevented some customers from purchasing services would decrease as a consequence of competitive entry by new firms.

68. The Commission should consider the deleterious effects the proposed rule would have on United States consumers. International telecommunications markets are not competitive. United States consumers pay rates significantly above the competitive level as a result of tacitly collusive behavior on the part of incumbent, facilities-based carriers. An alternative policy that would allow facilities-based entry by foreign-affiliated carriers regardless of the presence of reciprocal entry conditions in foreign carriers' markets has the potential to increase price competition which would benefit United States consumers.[23/]

B. U.S. Carriers Need Foreign Capital To Compete With AT&T And MCI

The proposed rule would also harm competition by denying U.S. firms needed capital to compete with AT&T and MCI. AT&T does not need foreign capital given its own enormous resources. MCI, of course, has already received a $4.3 billion cash infusion from BT to help it compete against AT&T. MCI seems to have adopted a "take the money and run" attitude. Having previously supported an open entry policy

[23/] Id. ¶¶ 66-68.

for foreign carriers,[24] MCI now has turned 180 degrees to join AT&T in supporting a rule to curtail foreign carrier entry.

The third largest carrier, Sprint, stresses the need for Commission approval of its $4.2 billion transaction in order to compete with AT&T and MCI. In questioning the fairness of the Commission's actions, Sprint states that

> Having allowed the BT/MCI transaction to go forward subject only to those conditions, it would be unfair to other U.S. carriers to now impose a different and more stringent standard for foreign investment, and BT's and MCI's Concert alliance would gain an unfair competitive advantage in the offering of global worldwide services.[25]

LDDS, the fourth largest carrier, recently acquired a 50% interest in IDB Mobile, which is also 50% owned by Teleglobe of Canada. More significantly, LDDS may need additional foreign capital to provide greater competition to AT&T and MCI. As LDDS explains:

> Regulatory barriers to foreign carrier investment in U.S. carriers will impair effective competition within the U.S., to the detriment of U.S. business and U.S. consumers. Apart from AT&T, most, if not all, U.S. carriers require financing outside of the traditional financial markets to expand their networks and service offerings. Foreign telecommunications entities are a crucial source of such capital, and the U.S. government must not take any action that will unreasonably deny U.S. carriers access to such capital.[26]

* * * * *

[24] See, e.g., MCI Reply Comments to AT&T Petition for Rulemaking at 1-2 ("The specific intent and undeniable effect of AT&T's proposed rules would be to deny the public the benefits that could be realized from alliances between U.S. and foreign carriers").

[25] Sprint Comments at 37 (footnote omitted).

[26] Comments of LDDS Communications, Inc. at 2 (Apr. 11, 1995) ("LDDS Comments).

In sum, the proposed rule would hurt competition in the U.S. market place: (1) by preventing foreign carriers from entering the market to provide facilities-based competition to AT&T, MCI and Sprint; and (2) by preventing existing U.S. carriers from obtaining needed foreign capital to compete with the largest U.S. carriers. The ultimate losers would be the American consumers who would pay more for international telephone service if the proposed rule were adopted by the Commission.

III. THE COMMISSION'S CURRENT SAFEGUARDS PROTECT AGAINST ANY POTENTIAL DISCRIMINATORY ABUSES

There is no need to harm competition in the United States by restricting foreign-carrier entry. In its Initial Comments, TLD pointed out that neither AT&T's Petition for Rulemaking nor the NPRM provided any anecdotal or empirical evidence that the Commission's extensive competitive safeguards have failed to protect U.S. carriers against discriminatory abuses.[27/] Similarly, no commenter -- including AT&T -- was able to provide any evidence that there have been any competitive abuses by foreign-affiliated carriers in their provision of international facilities-based IMTS.

Several commenters noted that the conditions placed on foreign-affiliated carriers by the Commission in the TLD Acquisition Order and BT/MCI Order[28/] impose stringent safeguards which have prevented any competitive abuses. For example, LDDS established that:

> The FCC already has in place the necessary regulatory tools, and remedies, to monitor, and prevent, anticompetitive conduct by dominant foreign carriers against unaffiliated U.S. carriers. In a series of decisions on foreign

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27/ Comments of TLD at 38-41 (Apr. 11, 1995) ("TLD Initial Comments").

28/ In re Request of MCI Communications Corp. British Telecommunications plc, 9 FCC Rcd 3960 (1994) ("BT/MCI Order").

carrier entry, the FCC has established comprehensive safeguards to prevent discriminatory conduct.[29/]

Many commenters pointed out that since these safeguards have been effective, neither AT&T nor the NPRM provides any basis for changing the current policy of relying on such safeguards. For example, Teleglobe stated that "[t]he Commission does not explain adequately why it now finds these [competitive safeguard] policies inadequate."[30/]

No commenter -- including AT&T -- provided any evidence that the Commission's current stringent competitive safeguards for foreign-affiliated carrier provision of international facilities-based services are inadequate to protect against discriminatory conduct.[31/] Instead, AT&T raises three hypothetical concerns.

29/ LDDS Comments at 7. See also British Government Comments at 4 (stating that "[t]he U.S. regulatory regime already encompasses significant safeguards, in particular through its route by route authorisation process."); Cable & Wireless Comments at 9 ("The Commission's dominant carrier policies were developed explicitly to prevent discrimination between affiliated carriers."); France Telecom Comments at 14, 21-22 ("FT believes that, in general, the requirements imposed on MCI in approving the BT-MCI transaction are adequate to ensure that a carrier that has monopoly control over bottleneck facilities in its home market will not be able to discriminate against a U.S. service provider on the United States-home country route" (footnote omitted)); Sprint Comments at 34-35 (Commission should rely on general rules for safeguards such as those in the BT/MCI order instead of § 214 proceedings).

30/ Teleglobe Comments at 26-27. See also Deutsche Telekom Comments at 24 (the Commission offers no basis for departing from previous operating assumption that the safeguards are sufficient to prevent anticompetitive conduct); Telex-Chile Comments at 1-2 ("[T]he present rules already permit the Commission to impose nondiscrimination requirements on foreign carriers as a condition of entry into the market for U.S. international telecommunications, and the NPRM points to no case in which that approach has proved inadequate.").

31/ The only "evidence" offered by AT&T that current safeguards have proven insufficient to prevent discriminatory treatment by foreign-affiliated carriers is a repetition of its complaint in the BTNA international private line resale proceeding (not facilities-based IMTS), where AT&T claims that BT has not lived up to the Commission's conditions relating to accounting rates. AT&T Comments at 15 n.11. AT&T has asked the Commission to revoke BTNA's authorization until it complies with the Commission's

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